

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



ORIGINAL

# 74-2241

## United States Court of Appeals

For the Second Circuit.

MARY JAMES, SAMMIE DORIS WILLOUGHBY, LUCIA SCIPP,  
on behalf of each and on behalf of all others similarly situated,  
and the WYANDANCH COMMUNITY DEVELOPMENT COR-  
PORATION,

*Plaintiffs-Appellees,*

*against*

AARON BARNETT, Supervisor of the Town of Babylon; VINCENT  
MANNA, Councilman for the Town of Babylon; ROWLAND  
SCOTT, Councilman for the Town of Babylon; SONDR  
BACHETY, Councilwoman for the Town of Babylon; PATRICK  
WATERS, Councilman for the Town of Babylon; RAY ALL-  
MENDINGER, Councilman for the Town of Babylon; HAROLD  
WITHERS, Councilman for the Town of Babylon; TOWN OF  
BABYLON.

*Defendants-Appellants.*

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,  
*Defendant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK.

### BRIEF FOR DEFENDANTS-APPELLANTS.

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LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

*Defendant.*

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## BRIEF FOR DEFENDANTS-APPELLANTS.

### Issues on Appeal.

1. Did the District Court Err in Granting Class Action Status?

A. Is There Any Factual Basis Upon Which the District Court Could Properly Have Relied in Determining to Grant Class Action Status?

B. Did the District Court Err in (1) Designating Plaintiffs as Class Representatives and (2) Defining the Class?

C. Is a Class Action Necessary or Even Desirable in This Case?

**Statement of Case.**

**A. Background of This Action.**

This action concerns the proposed construction of 182 low and moderate income housing units in the unincorporated hamlet of Wyandanch in the Town of Babylon, Suffolk County, New York, known as the "Commonwealth Drive Residential Proposal." The proposed housing development was to have been a joint project of the New York State Urban Development Corporation and two local organizations, the Suffolk County Development Corporation and the Wyandanch Community Development Corporation.

After an extensive and well attended public hearing on July 26, 1973, the Babylon Town Board, representing all of the residents of the Town of Babylon, passed on August 16, 1973, a resolution embodying eight specific objections to the project as proposed.

On March 18, 1974, some seven months later, this action was commenced by one of those local organizations and three individuals purportedly representing black Americans of moderate and low income presently residing in Wyandanch. It challenges what the complaint calls the Town Board's "veto" of the housing proposal, and it attacks a recent amendment to the New York State Urban Development Corporation Law.

Specifically, this action seeks declarations that (1) the enactment by the New York State Legislature of Chap-

ter 446 of the Laws of 1973 and the Babylon Town Board's resolution with respect to the Commonwealth Drive Residential Proposal are unconstitutional and unlawful as being racially discriminatory in their purpose and effect (J. A. 32a)<sup>1</sup>; (2) the actions by these two legislative bodies are also discriminatory against the poor (J. A. 32a); and (3) the Babylon Town Board's disapproval of the project, as proposed, (a) denies plaintiffs and members of their class the right to freely travel, migrate and settle (J. A. 33a), and (b) is "arbitrary and capricious, and is unsupported by any legitimate governmental interest" (J. A. 33a). Federal jurisdiction is allegedly grounded upon various federal statutes, including among others, 42 U. S. C. §§ 1981-1983 and the 14th Amendment to the United States Constitution.

By Chapter 446 of its Laws of 1973 (hereinafter referred to as the UDC amendment) the New York State Legislature granted to all towns and villages in the state, including the Babylon Town Board, what plaintiffs have chosen to characterize as the power to "arbitrarily veto" the subject project and others like it (J. A. 23a). Plaintiffs contend that the UDC amendment is unconstitutional in that it deprives them of their civil rights. Plaintiffs further contend that, acting pursuant to the UDC amendment, the Babylon Town Board improperly exercised its power in disapproving the project. In sum, plaintiffs seek to declare invalid the UDC amendment or, failing that, the Town Board's action under the amendment—all on the alleged bases of *racial* discrimination "in purpose and effect" and discrimination against the *poor*.

<sup>1</sup>All references designated "J.A.—" are to pages in the Joint Appendix.

### B. The Class Action Motion.

All three individual plaintiffs allegedly reside in the hamlet of Wyandanch, Suffolk County, New York, and according to the complaint bring this suit as a class action, pursuant to F.R.C.P. 23(a), (b) (2) and (b) (3) "on their own behalf and on behalf of all those similarly situated" (J. A. 10a). The corporate plaintiff does not seek designation as a class representative. According to the complaint (J. A. 10a), the class is composed of "elderly persons as well as persons of low and moderate income who are desperately in need of adequate and decent housing at reasonable rentals and who are or would be eligible for residence in the proposed Wyandanch housing development."

On or about May 31, 1974, the individual plaintiffs moved for an order granting class action status and determining the membership of the class. We cannot overemphasize the fact that this motion was made solely "upon the complaint filed in this action, the accompanying memorandum of law and all other documents filed herein \* \* \*" (J. A. 73a). No supporting affidavits were filed by plaintiffs, and no evidentiary hearing was held by the District Court to determine whether the allegations underlying the claimed right to maintain a class action have any basis in fact.

In opposition to plaintiffs' motion, counsel representing the Town defendants submitted an affidavit (J. A. 75a-77a) bringing to the District Court's attention certain important facts which had been omitted from the complaint. This factual data, which had been presented to the Town Board, consisted of UDC's own explanation as to its rental plan and the tenant priorities to be established for the project. It contained the following relevant statements:

"Although the goal of UDC is to have an income mix of 20% low income families, 70% moderate income families and 10% elderly, the exact percentage of low income households depends upon the availability of federal subsidies for this purpose.

\* \* \*

#### "TENANT PRIORITIES

It is a state and federal requirement that rental priority be given those persons displaced by government action and to veterans of the Vietnam war period.

Therefore priorities will be as follows:

Residents of Wyandanch who have been displaced by government action.

Residents of Wyandanch who are veterans of the Vietnam War.

Residents of Wyandanch, now living in unsound, unsafe and substandard housing that is deemed detrimental to the health and welfare of the inhabitants.

Other residents of Wyandanch.

Residents from outside the Wyandanch planning area will be selected only if the above categories are exhausted."

The importance of this data is that it (1) clearly demonstrates that the plaintiffs may not truly represent "the class" of persons who might have been aggrieved by the enactment of the UDC amendment and the Town Board's disapproval of the proposed project, and (2) raised factual issues which rendered the District Court's order

granting class action status erroneous both as a matter of law and as a matter of discretion.

### C. The District Court's Order.

Notwithstanding that the District Court did not have a sufficient factual basis to grant the class action motion and had before it only facts which establish that plaintiffs may not represent "the class" at all, the District Court nevertheless adopted as true the unsupported averments that plaintiffs represent "black Americans of *moderate* and low income presently residing in Wyandanch" (*italics added*) and even went so far as to adopt plaintiffs' mischaracterization of the rights created by the UDC amendment as a "statutory veto power."

In addition, the District Court adopted plaintiffs' unwarranted attempt to limit the class to low and moderate income *blacks*—despite the fact that UDC's own proposal creates an order of priority which may or may not consist mainly of such persons—and in so doing stated as follows:

"The priority given to displaced residents and Vietnam War veterans does not alter the thrust of the claim of *racial* discrimination. The overwhelmingly black population in the affected area rules out the probability of the assignment of whites in those priority classifications \* \* \*." (*Italics added.*) (J. A. 85a)

There is a complete absence in the record of facts to support this "finding." Moreover, the finding that plaintiffs represent black Americans of *moderate* income is unsupported even by the allegations of the complaint since all three individual defendants are allegedly recipients of public welfare or derive their income primarily from

social security. And finally, without any factual basis whatever the District Court has equated "black" with "poor," both of which are the target of the alleged discriminatory actions by the defendants.

Thus, it is respectfully submitted that in granting class action status on the present state of the record, defining the class as it did and designating plaintiffs as the class representatives, the District Court erred. Defendants are aggrieved by having to defend a class action which, it is submitted, should not be maintained as such and consists of an improperly designated class. As a result defendants are exposed to the likelihood of a multiplicity of future lawsuits by persons who may claim to have been aggrieved by defendants' acts but who were not joined in, and who therefore are not bound by, this litigation.

#### POINT I.

#### **The District Court's Finding Of Compliance With The Prerequisites Of F.R.C.P. 23 Has No Basis In Fact And Should Be Annulled.**

As stated by Professor Moore, "(a)n action, of course, is not maintainable as a class suit merely because it is designated as such in the pleadings; whether it is or is not depends upon the attending facts." 3B Moore, *Federal Practice*, 23.02-2, page 23-152 (2d Ed. 1969). In most class action applications the factual issues respecting whether the requirements of Rule 23 have been met will

be sufficiently complex to require a hearing<sup>2</sup> at which the party asserting the class has the burden of proof. See, e. g., *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555, 570 (2d Cir. 1968); *Cook County College Teachers Union, etc., v. Byrd*, 456 F. 2d 882, 885 (7th Cir. 1972); *Herbst v. Able*, 45 F. R. D. 451, 455 (S.D.N.Y. 1968); *Manual For Complex Litigation*, Section 1.40, page 19. Since the determination is a *factual* one, none should be made prior to discovery of the facts upon which the class action allegations are based. *City of New York v. International Pipe and Ceramics Corporation*, 410 F. 2d 295 (2d Cir. 1969); *Yaffe v. Powers*, 454 F. 2d 1362 (1st Cir. 1972); see, also, *Manual For Complex Litigation*, Section 1.40, page 20.

For reasons which are discussed in detail in Point II of this brief, we believe that such an evidentiary hearing should have been held with the parties being afforded an opportunity to conduct pre-hearing discovery on the class action allegations. But even assuming, *arguendo*, that such procedures are unnecessary in this case, we respectfully submit that as a *minimum* requirement the District Court should have had before it *affidavits* based upon personal knowledge showing plaintiffs' entitlement to maintain a class action. This is especially so in view of the fact that appellant's counsel submitted an affidavit for the purpose of attempting to establish as a matter of fact plaintiffs' possible lack of standing to sue.

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<sup>2</sup>We are referring only to limited hearings on the issue of compliance with the prerequisites of Rule 23 and not to the so-called "mini-hearings" or preliminary determinations on the merits condemned by the United States Supreme Court in *Eisen III* (*Eisen v. Carlisle & Jacquelin*, U. S. [1974]).

In remanding to the District Court in *Eisen II* (391 F. 2d 555, 569), this Court stated:

"Not only did the court below fail to analyze and give proper consideration to the standards set forth in 23(c) (2); there was also a lack of evidentiary basis for the findings necessary to support rulings of what would or would not amount to compliance with the requirements of due process and with the provisions of 23(c) (2).

\* \* \*

"Without an evidentiary hearing [on the question of identification of class members] we do not see how this question can be answered. \* \* \*

"The affidavits before us are conclusory in character and they merely scratch the surface. \* \* \*"  
(Matter in brackets supplied.)

Similarly, this Court commented in *Kohn v. Royall, Koe-  
gel & Wells*, 496 F. 2d 1094, 1095 (1974), that "(t)he com-  
plaint and the affidavits submitted to Judge Lasker in  
connection with the motions before him [for an order  
granting class action status] provide the sparse factual  
record for this appeal." (Matter in brackets supplied.)  
See, also, *Demarco v. Edens*, 390 F. 2d 836, 845 (2d Cir.  
1968) ["What evidence there is in the record as to the size  
of the 'class' \* \* \* is pure speculation. \* \* \* (i)t is  
fundamental that those seeking to maintain an action as a  
class action must make a positive showing that it would  
be impracticable to deny the prayer."]; and *Wolfson v.  
Solomon*, 54 F. R. D. 584, 590 (S.D.N.Y. 1972) ["Plead-  
ings and affidavits will normally suffice to supply the  
data required."]

As mentioned above, the only "facts" (as opposed to  
allegations) in the record are those submitted by the ap-  
pellants which demonstrate that the plaintiffs do not nec-  
essarily represent the class of persons who might be ag-

grieved by the alleged discriminatory acts. Plaintiffs have made no "positive showing" of their right or indeed their ability to adequately represent the class. If the factual record in the *Kohn* case, *supra*, was sparse," the one in the case at bar is barren.

For this reason alone the order of the District Court should be reversed and the matter remanded for a factual determination as to whether plaintiffs satisfy the exacting criteria of Rule 23.

## POINT II.

### **The District Court Erred In Designating, At This Stage, The Individual Plaintiffs As The Class Representatives.**

This point and the next one underscore the argument advanced in Point I—namely, that without an evidentiary basis it is impossible to determine at this stage the scope of the class and its proper representatives.

In their complaint, the plaintiffs claimed that the UDC amendment and the Town Board's rejection of the proposed project were *racially* discriminatory in purpose and effect and similarly discriminatory against *the poor* (J. A. 25a; 32a). Plaintiffs urged, and the District Court agreed, that they should be selected as representatives of a class including some combination of the concepts of "black," "poor," "low income," "moderate income" and "elderly."<sup>3</sup>

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<sup>3</sup>The District Court, however, found no need for representation of the elderly. As stated by Judge Mishler, "(t)he alleged discriminatory action was not based on age. If the action of the Town Board adversely affected plaintiff Mary James' right to decent housing, it was because of her race and not her age" (J.A. 86a).

But, as a factual matter the persons named to represent the class defined by the District Court [i. e., "black residents of Wyandanch who are or who would be eligible for the low and moderate income units \* \* \*" (J. A. 85a-86a)] do not adequately represent the interests of the designated class and may not, in fact, have standing to sue either individually or on behalf of the class. The contention that the court below erred in defining the class is covered in Point III, *infra*.

**A. Plaintiffs do not adequately represent the interests of the designated class.**

The "class" as defined by the District Court is "black residents of Wyandanch who are or who would be eligible for the low *and moderate* income units \* \* \*" (italics added); yet, none of the designated representatives falls under the category of "moderate income" which, after all, is to comprise approximately 70% of the income mix for the proposed project. Plaintiff Mary James is 83 years old, black, a resident of Wyandanch, and "an individual of low income," the primary source of her income being social security (J. A. 8a-9a); plaintiff Sammie Doris Willoughby is black, a resident of Wyandanch, unemployed and a welfare recipient (J. A. 9a); and plaintiff Lucia Scipp is black, a resident of Wyandanch residing in substandard housing and a welfare recipient (J. A. 9a-10a).

Who represents "black residents who are or would be eligible for the \* \* \* moderate income units \* \* \*"? The answer is clear: no one. To permit these plaintiffs to represent the class as defined by Judge Mishler would violate due process since it has been held that where the relief sought by the litigating class members may conflict with the interests of other members of the class, class action treatment violates the due process rights of the absentees and is therefore improper. *Hansberry v. Lee*,

311 U. S. 32, 45 (1940); *Giordano v. Radio Corp. of America*, 183 F. 2d 558 (3rd Cir. 1950); *Carroll v. American Fed. of Musicians*, 372 F. 2d 155 (2d Cir. 1967), rev'd on other grds. 391 U. S. 99; *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F. 2d 12, 24 (2d Cir. 1971).

The conflict which exists between the litigating class members and a portion of the class is not evident from the "record" which was before Judge Mishler; however, as demonstrated by the minutes of the public hearing on the proposed housing development, there were local black homeowners (who apparently would fall under the category of "moderate income" blacks) who were opposed to the project. In addition, the Town Board was recently approached by a number of black Wyandanch residents who clearly fit the description "moderate income" who wanted to know how they can assist the Town Board in defending against the instant litigation. As moderate income blacks, they "are or \* \* \* would be eligible \* \* \*" for the proposed housing units (or, more accurately, *might* be eligible, depending upon whether or not the tenant priority list had been exhausted); however, it is clear that some and perhaps many moderate income blacks are actually vehemently opposed to the project.

Thus, treatment of this suit as a class action has resulted in a situation where the interests of and relief sought by the designated representatives are at odds with the interests of other, *unrepresented* members of the class; and it is clear that the decree rendered in this case will be binding upon all members of the class, including absent members. *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356 (1921). All of this simply serves to underscore the original proposition: without a proper foundation in fact, the District Court was unwarranted

in designating the individual plaintiffs as representatives of the "class."

**B. The individual plaintiffs may not, in fact, have standing to sue.**

It is axiomatic that a class action plaintiff must establish his standing to sue. As stated by the Court in *Kauffman v. Dreyfus Fund, Inc.*, 434 F. 2d 727, 734 (3rd Cir. 1970), cert. den. 401 U. S. 974 (1971):

"A plaintiff who is unable to secure standing for himself is certainly not in a position to 'fairly insure the adequate representation' of those alleged to be similarly situated. \* \* \* In short, a predicate to [plaintiff's] right to represent a class is his eligibility to sue in his own right. What he may not achieve himself, he may not accomplish as a representative of a class."

Even in civil rights cases where courts have liberally applied the requirements of Rule 23(a), it is elementary that *the representative plaintiff bears the burden of proving some injury*; and the proposed class can assert no greater right to relief than the representative. *Wilson v. Kelley*, 294 F. Supp. 1005, 1010 (N. D. Ga., 1968), aff'd 393 U. S. 266 (1968). The purpose of this threshold requirement that plaintiffs seeking to maintain a class action have the status of class members "is to ferret out officious intermeddlers who personally do not possess the substantive right to litigate the claims of statutory violations sought to be litigated on behalf of others." See *Vernon J. Rockler & Co. v. Graphic Enterprises, Inc.*, 52 F.R.D. 335 (D. C. Minn., 1971), and cases cited therein at footnote 4.

It is respectfully submitted that the District Court has designated as class representatives persons who may or

may not, depending upon the facts, have standing to sue. As previously mentioned, the UDC has established its own tenant priority schedule and an income mix goal. The entire project contemplated only 182 units. There is no information before the Court to establish how many units will be occupied by whom as a result of UDC's priority schedule and proposed income mix. As we argued to the District Court in our memorandum of law in opposition to the class action motion:

"Moreover, insofar as plaintiffs seek to represent the poor, the project contemplates only 20% low income families. And there is nothing in the UDC proposed which indicates that it is exclusively for blacks, as would be implied by the claims of the plaintiffs. While 81% of the low income families in Wyandanch are black according to the complaint (J. A. 15a-16a) this leaves 19% who are whites. In view of the relatively small number of apartments involved, and the two classifications of potential residents who clearly stand ahead of any of the plaintiffs, *it may well appear on the trial of the action that these three plaintiffs who seek to represent the entire class of persons challenging these two governmental actions do in fact have no standing to sue whatsoever.*" (Italics supplied.)

Once again this serves only to emphasize the importance of our original point that, in the absence of evidence, the District Court should not have granted plaintiffs' motion but rather, at the very least, should have directed the filing of affidavits and probably should have ordered a hearing with an opportunity for prehearing discovery, if necessary.

### POINT III.

#### The District Court Erred In Defining The Class.

The District Court defined the class as consisting of "black residents of Wyandanch who are or would be eligible for low and moderate income units \* \* \*." By narrowly confining the class to blacks, however, the court below has ignored plaintiff's own allegation that the UDC amendment and the Town Board's rejection of the housing project discriminates against the *poor*. In effect, the Court below has simply equated "black" with "poor."

As pointed out in Point II B of this brief, approximately 19% of the low income families in Wyandanch are not black. Thus, many poor persons who could qualify for the proposed housing units might not necessarily be blacks; yet, they have been excluded from the class, or, rather, the class has been limited to *blacks only* without any apparent reason or basis in fact.

In its opinion the court below stated that "(t)he overwhelmingly black population in the affected area rules out the probability of the assignment of whites in those priority classifications," referring to the priority afforded to displaced Wyandanch residents and Wyandanch Vietnam War Veterans. The defects with this holding, however, are that it totally ignores the facts that (1) the affected area is not totally "black"; (2) while UDC envisions only 20% low income families in the project, 70% of the families would be of moderate income; and (3) there is no basis whatsoever in the record for the assumption that the first and second classes of UDC's priority schedule will exhaust the available units.

Under UDC's own proposal, financial status, not race, is the eligibility test. Of the 70% moderate income fami-

lies to occupy the units, who can say what percentage thereof will be black? To limit the class to blacks only as did the court below is not only unwarranted by the facts, but is, in effect, a form of reverse racial discrimination.

Perhaps more important, however, is the fact that by limiting the class to blacks only, the District Court has unduly restricted the *res judicata* effect of any judgment to be rendered in this action. One of the main purposes of the class action device is to broaden, not narrow, the *res judicata* effect of the decree so that each class member may enforce a *favorable judgment*. See *Hawaii v. Standard Oil Co.*, 405 U. S. 251 (1972); *Whitmore v. Tarr*, 318 F. Supp. 1279, 1285 (D. Neb. 1970), vacated on other grounds 443 F. 2d 1370, cert. den. 403 U. S. 922; *Schrader v. Selective Service System, Local Board No. 76 of Wisconsin*, 329 F. Supp. 966, 967 (W.D. Wis., 1971).

On the other hand, in the event of an *unfavorable judgment* in this action (i. e., dismissal of the action or a declaration of the validity of the legislative acts in issue), the State and the Town run the risk of multiple future lawsuits by other persons who may claim to have been aggrieved by defendants' acts or not adequately represented, but who were not joined in, and who therefore are not bound by, this litigation. If this action is to proceed as a class action, then at a minimum all classes of persons—black, white, Hispanic, low income, moderate income, etc.—should be made members of the class so that all of the issues raised in this litigation can be definitively decided in the same forum.

## POINT IV.

## Class Action Treatment Is Neither Desirable Nor Necessary For Plaintiffs' Claims.

This case involves basically one claim challenging the constitutionality of a single determination by a public body; under such circumstances a class action is unnecessarily cumbersome. In the court below we argued, therefore, that the class action device was neither appropriate nor desirable here. In reply the Court stated as follows:

"The Advisory Committee's Notes to Rule 23 \* \* \* explicitly recognize that civil rights actions in which 'a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration' are within the scope of subdivision (b)(2). Moreover, courts have consistently treated actions challenging racial discrimination in housing as 23(b)(2) actions" (J. A. 83a-84a).

Neither the Advisory Committee's Notes nor older court decisions compel a conclusion that the case at bar should be treated as a class action; indeed, the courts have begun to lean in the opposite direction.

In *Galvan v. Levine*, 490 F. 2d 1255, 1261 (2d Cir. 1973), Judge Friendly stated that class action relief in Rule 23 (b)(2) actions is "largely a formality" and that "what is important \* \* \* is that the *judgment* run for the benefit not only of the named plaintiffs but of all others similarly situated \* \* \*". A number of courts have applied the *Galvan* rationale to all (b)(2) class actions. See, *Edwards v. Schlesinger*, 377 F. Supp. 1091, 1093 (D.D.C. 1974); *McDonald v. McLucas*, 371 F. Supp. 831 (S.D.N.Y. 1974); *Tyson v. New York City Housing Authority*, 369 F. Supp. 513 (S.D.N.Y. 1974); *Schneider v. Margosian*, 349 F. Supp.

741, 746 (D. Mass., 1972) (three-judge court); *Doe v. Lavine*, 347 F. Supp. 357 (S.D.N.Y. 1972). See also, *Vulcan Society v. Civil Service Commission*, 490 F. 2d 387 (2d Cir. 1973). But see, *contra*, *Fujishima v. Board of Education*, 460 F. 2d 1355 (7th Cir. 1972), and *Hammond v. Powell*, 462 F. 2d 1053 (3rd Cir. 1972).

In the *Manual For Complex Litigation*, Section 1.401, it is pointed out that:

"There are types of cases in which it is patently undesirable to allow a class action to be maintained. It is rarely necessary, for instance, to maintain a class action in cases in which declaratory or injunctive relief is sought because of the alleged facial unconstitutionality of a federal or state statute or regulation. As was recently stated by the Eighth Circuit Court of Appeals in *Ihrke v. Northern States Power Co.*, 459 F. 2d 566, 572 (C.A. 8 1972):

"The determination of the constitutional question can be made by the Court and the rules and regulations determined to be constitutional or unconstitutional, regardless of whether the action is treated as an individual action or a class action. No useful purpose would be served by permitting this case to proceed as a class action."

While it is true that the Advisory Committee's Notes to Rule 23 include within the scope of (b)(2) class actions civil rights cases, the *Manual For Complex Litigation*—described in the "Forward" thereof as "the product of experience and the development of able minds"—recognizes that class actions are usually unnecessary in civil rights litigation such as the case at bar.

Class actions certainly do serve a useful purpose if invoked in the proper context; but they also tend to become unnecessarily cumbersome and time-consuming.

Judge Lumbard's characterization of *Eisen II* as a "Frankenstein monster posing as a class action" (391 F. 2d 555 at 572) serves to point up exactly what we mean: had the instant case been brought as a regular action and not as a class action, it most likely would already be in or beyond the pretrial discovery stage and well on its way to trial; instead, it is necessarily before this Court on the threshold question of whether it is a properly designated class action.

There is simply no need to maintain this action as a class action. A single person with standing to sue can determine the validity of the challenged determinations without resort to the class action device. This is not a consumer type of action in which a fund is involved; nor are there numerous potential parties, each damaged by a separate act of the defendants; nor do we have numerous parties, each of whom is entitled to be made whole or to be compensated for a loss arising out of a different transaction.

If, as we submit, class action status is unimportant to the prosecution of this case, one might logically ask why we are here seeking to reverse the District Court's order. The answer is simple: the Town Board, which is elected by *all* the residents of the Town of Babylon and which must guard the rights of *all* Town residents, has been placed in an impossible position by the District Court's permitting this action to proceed as a class action.

Many residents of the Town are opposed to the project; many residents of *Wyandanch* are also opposed to the project. This is not a case of *racial* discrimination by the Town Board against *Wyandanch's* black residents; rather, it is a case of the Town Board's response to legitimate concerns expressed by *Wyandanch* residents

about the future of their own economically beleaguered area. The underlying dispute is not between blacks and whites; it is between persons of moderate income, many of them blacks, and persons of low income. Against this backdrop of conflict is a class action order which designates certain low income black individuals to represent the interests of all persons, including those of moderate income, who are or might be eligible for the available units. The moderate income foes of the project not only lack any representation, they are, indeed, misrepresented by persons with interests in conflict with theirs. As a result they look to the Town Board to protect their interests.

The Town Board thus finds itself on the horns of a dilemma in that the class action order has the anomalous effect of pitting the Town Board against the moderate income families of Wyandanch—the very persons whose interests the Town Board has all along sought to protect from what it believes to be an ill-conceived housing proposal.

It is respectfully submitted that, in view of the foregoing, we would do well to take heed of Mr. Justice Burger's observation that "the federal court system is for a limited purpose, and lawyers, the Congress and the public must examine carefully each demand they make on that system." Burger, *The State of the Judiciary*, 56 A.B.A.J. 929, 933 (1970).

**CONCLUSION.**

For the foregoing reasons the order of the District Court should be reversed and the matter should either (a) proceed as a regular action or (b) be remanded for hearing on the questions of class definition and designation of class representatives.

Respectfully submitted,

PRATT, CAEMMERER & CLEARY, P. C.,  
Attorneys for Defendants-Appellants.

GEORGE C. PRATT and  
RICHARD P. BRODER,  
Of Counsel.

## UNITED STATES COURT OF APPEALS :: FOR THE SECOND CIRCUIT

MARY JAMES, SAMMIE DORIS WILLOUGHBY, et al

Plaintiffs-Appellees

v.

AARON BARNETT, ... TOWN OF BABYLON, et al

Defendants-Appellants

LOUIS J. LEFKOWITZ, Attorney General of the State of New York  
DefendantAFFIDAVIT  
OF SERVICESTATE OF NEW YORK,  
COUNTY OF New York, ss:Bernard Greenberg being duly sworn,  
deposes and says that he is over the age of 21 years and resides at 162 East 7th St  
New York, N.Y.  
That on the 26th day of November 1974 at 3 New York

he served the annexed Brief for Defendants-Appellants

upon  
Attorneys for Mary James, Sammie  
Doris /Willoughby, et al  
in this action, by delivering to and leaving with said Plaintiffs-Appellees  
Arthur Eisenberg, Lawrence G. Sager, Bruce Ennis three copies each true cop thereof.DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the  
person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 26th

day of November 1974 }

ROLAND W. JOHNSON  
Notary Public, State of New York  
No. 4509705  
Qualified in Delaware County  
Commission Expires March 30, 1975

Bernard Greenberg

United States Court of Appeals

376-Affidavit of Service by Mail

for the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Mary Jammes, Simmie Doris Willoughby, Lucia Scipp,  
on Behalf of each and on behalf of all others similarly  
Situating, and the Wyndanch Community Development Corporation

Plaintiffs-Appellees

against

Aaron Barrnett, et al.

Defendants-Appellants

Louis J. Lefkowitz, Attorney General of the State of New York

Defendant

**AFFIDAVIT  
OF SERVICE  
BY MAIL**

State of New York, County of New York

ss.:

Raymond J. Braddick, , being duly sworn deposes and says that he is  
agent for Eugene C. Pratt Esq. the attorney for the above named  
Defendants-Appellants herein. That he is over 21 years  
of age, is not a party to the action and resides at Levittown, New York

That on the 26th day of November, 19 74, he served the within

Brief and Appendix  
attorney for the above named Plaintiff-Appellee

by depositing 3 copies to each of the same securely enclosed in a post-paid wrapper  
in the Post Office regularly maintained by the United States Government at  
90 Church Street, New York, New York

directed to the said attorney for the Plaintiff  
at No. 150 White Plains Road, Tarrytown,

N. Y., that being the address within the state designated by them for that purpose, or the  
place where they then kept an office, between which places there then was and now is a regular  
communication by mail.

Sworn to before me, this 26th.

day of November 19 74

*Roland W. Johnson*  
ROLAND W. JOHNSON  
Notary Public, State of New York  
No. 41870  
Qualified in Westchester County  
Commission Expires March 30, 1975

*Raymond J. Braddick*